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Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted]66

THOMAS A. ALVAREZ,

Petitioner,

—v.—

STATE OF NEBRASKA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

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Gottlieb, "Testing the Death Penalty," 34 S. Cal. Law Rev. 268 (1961) 22

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In the

Supreme Court of the United States

October Term, 1967

No. .....

Thomas A. Alvarez,

Petitioner,

—v.—

The State of Nebraska,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Nebraska entered in the above-entitled case on December 8, 1967.

Citations to Opinions Below

The judgment of death of the County Court of Lancaster County, State of Nebraska, made on March 31, 1967, is unreported. It is contained in the record at p. 19 and is printed in the Appendix, *infra,* pp. 29-30. The opinion of the Supreme Court of Nebraska is reported at 182 Neb. 358 (1967) and is set forth in the Appendix, *infra,* pp. 31-40.

Jurisdiction

The judgment of the Supreme Court of Nebraska was entered on December 8, 1967. Motion for Rehearing was denied on January 29, 1968. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257(3).

Questions Presented

1. Whether the denial to petitioner of an opportunity to comment on and rebut by his own evidence prejudicial allegations contained in a presentence report put in evidence at the sentencing hearing by the trial judge, violates the due process clause of the Fourteenth Amendment?
2. Whether the imposition of the death penalty pursuant to Section 28-401, R. R. S. of Nebraska (1943), violates the due process clause of the Fourteenth Amendment because the statute is vague and lacks reasonably certain standards for decision?
3. Whether the imposition of the death penalty on petitioner pursuant to Section 28-401 inflicts loss of life without any compelling justification in violation of the due process clause of the Fourteenth Amendment?
4. Whether the sentence of death imposed on petitioner pursuant to Section 28-401 is a cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?

Statute Involved

Section 28-401, R. R. S. of Nebraska (1943):

> Whoever shall purposely and of deliberate and premeditated malice or in the perpetration of or attempt to perpetrate any rape, arson, robbery or burglary, or by administering poison, or causing the same to be done, kill another; or, whoever by willful and corrupt perjury or subornation of the same, shall purposely procure the conviction and execution of any innocent person, every person so offending shall be deemed guilty of murder in the first degree and upon conviction thereof shall suffer death or shall be imprisoned in the Nebraska Penal and Corrections Complex during life. If the accused is found guilty by a jury, they shall fix the punishment by their verdict; upon a plea of guilty, after the defendant has been fully informed of his constitutional rights, the punishment shall be fixed by the court.

Statement of the Case

Petitioner, born in 1947, is a young man of Mexican-American ancestry. *State* v. *Alvarez,* 182 Neb. 358, 359 (1967), Appendix, *infra,* p. 31. A criminal proceeding brought by an information (R. 5), charged petitioner with premeditated murder, killing in the perpetration of a rape, and killing in the perpetration of a robbery (R. 5). Petitioner waived preliminary hearing and was bound over to the District Court of Lancaster County on September 29, 1966 (R. 10). On December 22, 1966, petitioner was arraigned on Count I and pleaded guilty (R. 17). The Court suspended further proceedings pending an investigation

by the adult probation officer (R. 17). On January 16, 1967, Counts II and III were dismissed (R. 18). In March, 1966, petitioner was given a psychiatric examination by a U. S. Navy physician who reported that although defendant was an "Emotionally Unstable Personality" he was "fully responsible for all his actions." *State* v. *Alvarez, supra,* at 361, Appendix, *infra,* p. 34. Two doctors for the defendant concluded jointly that he was temporarily insane, unable to tell the difference between right and wrong at the time of the alleged acts. *Id.* at 362-63, Appendix, *infra,* pp. 35-36.

The pre-sentence report contained a number of allegations prejudicial to petitioner including, but not limited to, a statement by a police sergeant that he believed petitioner guilty of a previous murder, Presentence Investigation Report, p. 31,[1] a statement by the five-year-old son of the deceased that defendant had entered the home uninvited (*id.* at 26, 27 [Petitioner consistently maintained that he had been invited in. See, e.g., Presentence Investigation Report, p. 105.]), and a statement by a police polygraph examiner that "It is definitely the opinion of this examiner that Thomas Alvarez was also responsible for other sex crimes at other places." Presentence Investigation Report, p. 24.

At the sentencing hearing, the trial court considered and placed into evidence on its own motion the 198-page presentence investigation report, which, apart from material submitted in petitioner's behalf, contained police records and investigation reports, defendant's statements, psy-

[1] A copy of the Presentence Investigation Report is part of the record filed with the Clerk of the Court. It is separately paginated.

chiatric reports, and statements about the petitioner by people who had known him. Petitioner was given no opportunity either to comment on the contents of the report or to offer his own evidence in rebuttal of the allegations which it contained. *State* v. *Alvarez, supra,* at 363, Appendix, *infra,* p. 36.

On March 31, 1967, the trial Judge sentenced petitioner to death without any statement of reasons (R. 19).

On automatic appeal to the Supreme Court of Nebraska, that Court concluded that the sentence was not "excessive" under Section 29-2308, R. R. S. of Nebraska (1943). The Court also rejected the arguments that the death penalty was a cruel and unusual punishment under the Eighth Amendment and was unnecessary in violation of the due process clause of the Fourteenth Amendment. 182 Neb. at 366, Appendix, *infra,* p. 39. The Court further held that the defendant had no state or federal constitutional right to review, rebut or comment on the contents of the pre-sentence report. *Id.,* at 363, Appendix, *infra,* p. 36. The Court did not deal explicitly with the argument presented by petitioner that Section 28-401 violated the due process clause of the Fourteenth Amendment because it was vague and lacked "rational guidelines" for decision. This point was re-raised in a motion for rehearing, together with the claim of cruel and unusual punishment under the Eighth and Fourteenth Amendments. The motion was denied on January 29, 1968.

Reasons for Granting the Writ

Certiorari should be granted in this case because it involves substantial federal constitutional issues concerning the procedures by which a state may deprive a man of his life. While this case involves directly only one man, its implications affect the lives of over four hundred people now under sentence of death.

This Court has always given special attention to all issues presented in death cases because of the finality of the punishment. Here, where capital punishment itself, as well as its traditionally discretionary method of application, are under constitutional attack, plenary consideration is all the more appropriate.

This case presents four substantial contentions of constitutional law which should be determined by this Court.

I.

The sentence of death was imposed on petitioner in violation of the due process clause of the Fourteenth Amendment because petitioner was denied the opportunity to comment on and rebut by his own evidence prejudicial allegations which were contained in a pre-sentence report put in evidence by the trial judge on his own motion.

In *Williams* v. *New York,* 337 U. S. 241 (1941), this Court rejected the argument that due process required the presentation of all evidence at a sentencing hearing by witnesses in open court subject to cross-examination. With respect to pre-sentence reports by probation workers, the Court said, *inter alia,* that, "To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation." 337 U. S. at 249-50.

Petitioner need not quarrel with the result in *Williams,* see Davis, 1 *Administrative Law* §7.16 (1958), to assert that the procedures used in sentencing him to death—compilation by the trial judge of a 198-page pre-sentence report that petitioner was not permitted to see prior to the sentencing hearing when it was received in evidence, and whose contents petitioner was given no opportunity to comment upon or to rebut—denied him the fundamental fairness required by due process. Indeed, the rejection by *Williams* of any right on the part of a defendant in a sentencing hearing to confront and cross-examine all persons giving information unfavorable to him lends added

importance to the very different right claimed here: the right merely to adequate notice of the contents of a pre-sentence report, and to some fair chance to comment on and attempt to refute by his own evidence allegations contained in a report which is received in evidence by the court as the basis for its decision whether he shall live or die.[3] The requirements of fair notice and of opportunity to explain and rebut, unlike a requirement of confrontation and cross-examination, do not effectively deny to the court any information, gathered by any investigative method, which the court may wish to consider. It does not even impose the burden of bringing into open court the witnesses on whose *ex parte* communications the court may choose to rest its life-or-death determination. It demands only that the defendant, with his life at stake, have some warning of, and a chance intelligently to rebut prejudicial allegations contained in the pre-sentence report. Petitioner contends that this is the minimal demand which due process imposes on capital sentencing.

While it is true that the "due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of [criminal] trial procedure," *Williams* v. *New York, supra,* at 251, the mere fact that a proceeding involves sentencing should not shield it from the more flexible requirements of due process as they are ap-

[3] Petitioner was allowed to present material for inclusion in the pre-sentence report (Presentence Investigation Report, pp. 142-198), but at the time he was permitted to offer such material he did not and could not know of the prejudicial allegations contained in other material in the report, and he was given no opportunity to comment on or rebut those allegations when the report was entered in evidence at the sentencing hearing.

plied in administrative hearings.[3] See Davis, 1 *Administrative Law* §§7.02, 7.04 (1958), cf. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 171-72 (1951) (Frankfurter, *J.*, concurring). Even in a sentencing procedure, the defendant has a right not to be acted against on the basis of inaccurate information. See *Townsend* v. *Burke*, 334 U. S. 736 (1948). But this right is illusory unless the defendant can know and challenge in some way the information on the basis of which the decision is to be made. See Note, Due Process in Sentencing, 81 Harv. L. Rev. 821, 826 n. 27 (1968).

The refusal to allow a defendant to see or contest information contained in a pre-sentence report has ordinarily been based for the most part on an alleged need for confidentiality to protect the continuing supply of information from secret informants. See, e.g., Roche, The Position for Confidentiality of the Pre-sentence Investigation Report, 29 Albany L. Rev. 206, 212 (1965). The rule of complete confidentiality has recently been the subject of much criticism.[4] But on the record of the present case, the policy of protecting the confidentiality of secret sources was not invoked. The pre-sentence report was fully disclosed by the court itself, apparently in order to allow the Supreme Court of Nebraska to consider the information it contained upon its automatic review of the case. Petitioner, however,

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[3] Even in *Williams* itself, the Court indicated that sentencing was not "immune from scrutiny under the due process clause." 337 U. S. at 252 n. 18.

[4] See, e.g., Note, Due Process in Sentencing, 81 Harv. L. Rev. 821, 835-41 (1968); Note, Due Process and Legislative Standards in Sentencing, 101 U. Pa. L. Rev. 257, 277-78 (1952); Model Penal Code §7.07(5) (Proposed Official Draft 1962); Higgins, Confidentiality of Pre-sentence Reports, 28 Albany L. Rev. 12, 32-33 (1964).

was given no opportunity to comment on or contest its allegations.

The only possible justification for such a procedure is concern about time-consuming proliferation of minor issues. But this problem could easily be controlled through reasonable limitations on presentations by defense counsel, see Note, Due Process in Sentencing, 81 Harv. L. Rev. 821, 841 (1968); and in any event, in a capital case, the concern is an inadequate justification for the substantial prejudice to defendants likely to result from denial of fair notice and opportunity to rebut unfavorable information.

The danger of prejudice implicit in a system of denying defendants the chance to contest allegations against them in pre-sentence reports is made palpable in the present case. The pre-sentence report here included three assailable and exceedingly prejudicial statements. The first was the written report of a Lincoln, Nebraska police detective who related a telephone conversation he had had with one Sergeant Montoya of the Denver police department. Presentence Investigation Report, p. 31. Sergeant Montoya had said that his department had arrested petitioner on August 19, 1966, for investigation in the apparent murder of a Denise Bargas in Denver. The sergeant continued that he felt "definitely in his own mind" that petitioner was responsible for the killing and that he "definitely" knew that petitioner had to be at the address when the murder took place, but that he "could not prove any of this." *Ibid.* In short, Sergeant Montoya accused petitioner of a prior murder even though the investigation of his relationship to the crime had been dropped. It is significant that even the Supreme Court of Nebraska relied upon petitioner's

supposed involvement in the Bargas murder as an aggravating circumstance supporting the imposition of the death penalty upon him. 182 Neb. at 360; App., *infra*, p. 33.

Another prejudicial statement was that of the five-year-old son of the deceased, recorded in the police reports, that petitioner had entered the deceased's home uninvited. (See Pre-sentence Investigation Report, pp. 26, 27, and an unnumbered page between pages 42 and 43.) This story was directly contrary to petitioner's version of the events. See *State* v. *Alvarez, supra,* at 359; App., *infra,* p. 32. Petitioner maintained that he had been invited in, but—for want of adequate notice of the issue—developed no evidential support beyond his own professions to this effect.

The third prejudicial statement which petitioner had no opportunity to rebut was that of a police polygraph examiner that ". . . Alvarez was also responsible for other sex crimes at other places." Presentence Investigation Report, p. 24.

These statements involved grave and obvious prejudice to the defendant. We submit that the question is substantial whether a procedure is constitutional that allows the sentence of death to be based on such statements, without the slightest opportunity for rebuttal.

II.

The sentence of death imposed on petitioner pursuant to section 28-401 violates the due process clause of the Fourteenth Amendment because it is vague and lacks reasonably certain standards for decision.

Whatever else due process of law may encompass, it has always been thought to impose some demand of fundamental procedural regularity in decision-making, some insistence upon the rule of law, some adherence to the principle established by Magna Carta that the life and liberty of the subject should not be taken but by the law of the land. This Court has long condemned a degree of vagueness in criminal statutes which allow the fact-finder to create its own standard in each case. See, e.g., *Herndon* v. *Lowry*, 301 U. S. 242, 263 (1937); *Smith* v. *Cahoon*, 283 U. S. 553 (1931); *Cline* v. *Frink Dairy Co.*, 274 U. S. 445 (1927); *Connally* v. *General Construction Co.*, 269 U. S. 385 (1926). See also *Giaccio* v. *Pennsylvania*, 382 U. S. 399 (1966). The vice of such statutes is not alone their failure to give fair warning of prohibited conduct, but the breadth they leave for arbitrariness and suasion by impermissible considerations. See *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 432-433 (1963); *Freedman* v. *Maryland*, 380 U. S. 51, 56 (1965); *Lewis, The Sit-In Cases: Great Expectations*, 1963 Supreme Court Review 101, 110, including racial considerations, see *Louisiana* v. *United States*, 380 U. S. 145 (1963); *Dombrowski* v. *Pfister*, 380 U. S. 479 (1963); *Cox* v. *Louisiana*, 379 U. S. 536 (1965), and every other insidious urging of caprice or prejudice.

The dangers implicit in unbridled discretion in imposing punishment are illustrated in the grim history of the dis-

criminatory use of the death penalty in the United States. Of those convicted of intentional homicide only about one per cent are executed.[5] This one per cent is almost universally poor and friendless.[6] Even if judges and juries do not intentionally favor the rich, the wealthy men can afford to pay for a superior presentation of his case.

Negroes, Puerto Ricans, and Mexican-Americans convicted of capital crimes are more often sentenced to death than whites. In New York State, for example, 85 per cent of those sentenced to death were Negroes. See Dorsen, "The Death Penalty—A Civil Liberties Issue?", Civil Liberties (No. 221, December, 1964). Negroes sentenced to death are more likely to be executed than whites. See Wolfgang, Kelly, and Nolde, "Executions and Commutations in Pennsylvania," in Bedau, *The Death Penalty in America,* 466, 473-77 (1964). Thus it is not completely by chance that this defendant is of Mexican-American descent.

Under "vagueness" decisions cited above, it could scarcely be contended that a statute would be valid which provided: "Whoever is found condemnable in the discretion of a judge shall be guilty of an offense." Yet a parallel standard has been found an acceptable basis for a judicial decision of "death" for petitioner rather than "life" by the Nebraska Supreme Court. Section 28-401, R. R. S. of Nebraska (1943), provides in part,

> "upon a plea of guilty, after the defendant has been fully informed of his constitutional rights, the punishment shall be fixed by the court."

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[5] Berman, "Capital Punishment Is on the Way Out," The Progressive, Apr. 1, 1960.

[6] See, e.g., Johnson, "Executions and Commutations in North Carolina" in Bedau, *The Death Penalty in America,* 452, 459-61 (1964).

The trial court has no guides or standards; it need give no specific reasons for its decision and it did not do so in this case (R. 19). On appeal, which is automatic after a sentence of death [R. R. S. §29-2306.01 (1943)],

> "... the Supreme Court ... may reduce the sentence rendered by the district court against the accused, when in the opinion of the court the sentence is excessive, and it shall be the duty of the Supreme Court to render such sentence against the accused as in its opinion may be warranted by the evidence ..." R. R. S. §2308 (1943).

The decision on appeal is merely a repetition of the trial court's unconfined and undefined sentencing discretion. Many possible factors are potentially relevant, yet the final decision ultimately being uncontrolled except by the individual consciences of the members of the court. See *State* v. *Alvarez, supra,* Appendix, pp. 31-40, *infra.* Compare, e.g., *Hamblin* v. *State,* 81 Neb. 148, 115 N. W. 850 (1908); *Muzik* v. *State,* 99 Neb. 496, 156 N. W. 1056 (1916); *Cryderman* v. *State,* 101 Neb. 85, 161 N. W. 1045 (1917); *Swartz* v. *State,* 118 Neb. 591, 225 N. W. 766 (1929); *State* v. *Hall,* 176 Neb. 295, 125 N. W. 2d 918 (1964).

Procedures like Nebraska's are justified on the theory that standards are not necessary in the sentencing process because no issue of fair warning to potential defendants is involved. But in *Giaccio* v. *Pennsylvania,* 382 U. S. 399 (1966), this Court squarely held what its earlier decisions had plainly implied, see *Note,* 109 U. Pa. L. Rev. 78, 80-85 (1960): that the concern of the due process clause for fundamental regularity in the process of judicial decision-making—for the rule of law, rather than the arbitrariness

of unprincipled *ad hoc* judgment—is not confined to situations in which arbitrariness may *also* present the problem of fair warning. Plainly, an initial finding of guilt is an inadequate basis for exempting all further decision-making proceedings from the requirement of procedural regularity imposed by rational standards, and for exposing defendants to the whims and prejudices of judges and juries. *Giaccio* teaches that sanctioning, like all other judicial processes bound by the Due Process Clause, must conform to the principle of governance by rules of law, not men. And more is at stake in a sentencing choice between life and death than in the assessment of costs in a minor misdemeanor matter like *Giaccio*.

In fact, the present lack of reasonable standards and other procedural due process protections for defendants at sentencing has been tolerated because of a fortuitous combination of historical circumstances. In the Eighteenth Century, the defendant would not have been aided by procedural protections at sentencing, because the penalty for a crime was usually fixed inflexibly by common law or statute. See Note, "Procedural Due Process at Judicial Sentencing for Felony," 81 Harv. L. Rev. 821 (1968). Pardon was the only way of obtaining mitigation of sentence. Thus when individualization of sentence became possible with statutory changes in the nineteenth century, "[c]ourts . . . may well have continued to take the view that the prisoner was still asking for mercy rather than 'justice' . . . that the primary burden of the role formerly charged by the executive had now shifted to the judges." *Id.* at 822-23.

Later in the nineteenth century the "new" penology began to develop corrections theories which called for the individualization of punishment based on the opinions of

experts as to the need of the defendant for specialized "treatment." With this change of theory, however, procedural due process requirements continued to be ignored on the grounds that they would interfere with the use of scientific opinion and that they would make sentencing an unduly burdensome procedure. See, e.g., *Williams* v. *New York, supra,* at 250-51.

Substantial doubt, however, has been thrown on the traditional needlessness of due process requirements at the sentencing stage by three cases decided by this Court within the past year. In *Mempa* v. *Rhay,* 389 U. S. 128 (1967), *In Re Gault,* 387 U. S. 1 (1967), and *Specht* v. *Patterson,* 386 U. S. 605 (1967), this Court applied to areas previously marked by unfettered judicial discretion the principle that procedural protections for defendants must be afforded commensurately with the extent to which the defendant's interests are realistically affected at any stage of the criminal process.

In *Mempa* v. *Rhay, supra,* the Court explicitly recognized "the critical nature of sentencing in a criminal case"; 389 U. S. at 134, and made provision of counsel mandatory at that stage, even if it is delayed by provisional release. 389 U. S. at 137. But to guarantee the defendant counsel at a sentencing procedure without requiring that the sentencing decision be based on intelligible principles may provide the defendant with an illusory right. While a lawyer can be of significant use to the defendant in challenging those facts which he is permitted to know, see *Williams* v. *New York, supra,* and Point I, *supra,* and in preserving various procedural rights, see *Mempa* v. *Rhay, supra,* the lawyer cannot provide his most important service—effective argument to a court for an appropriate disposition on the

basis of neutral principles—unless there are intelligible standards, known to both judge and lawyer, by which the decision is to be made. Without the possibility of argument from and to neutral principles, it is hard to call a decision-making process a legal one at all.

Just as significant as *Mempa* is the *Gault* case in which this Court applied the requirements of procedural due process to juvenile court proceedings, which had previously been left uncontrolled in order, *inter alia,* to maximize the use of discretionary, but expert decision-making. See also *Kent* v. *United States,* 383 U. S. 541 (1966). Citing evidence of the failure of juvenile courts to live up to their "scientific" goals, 387 U. S. at 18 *et seq.,* this Court imposed upon them the basic elements of a due process hearing. 387 U. S. at 31-59. Authoritative evidence now indicates that sentencing courts across the country have failed as badly as the juvenile courts. The history of discretionary sentencing, like juvenile court history, "has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." 387 U. S. at 18. The Task Force Report on The Courts of the President's Commission on Law Enforcement and Administration of Justice (1967) concluded (at p. 23) that "[t]he existence of unjustified disparity [in sentencing] has been amply demonstrated by many studies.[7] It is a pervasive problem in almost all jurisdictions." The

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[7] The Report cites Bennett, Countdown for Judicial Sentencing, Fed. Prob. Sept. 1961, pp. 22, 26; Youngdahl, Remarks Opening the Sentencing Institute Program, 35 F. R. D. 387, 390-91 (1964); Van Dusen, Trends in Sentencing Since 1957 and Areas of Substantial Agreement and Disagreement in Sentencing Principles, *id.,* at 395 (1964).

Task Force Report recommended "enactment of criteria for sentencing" and educational programs for judges. *Id.* at 24.

The gross injustice which the President's Commission found at all levels of sentencing is peculiarly intolerable when it infects the application of the death penalty. Even if the imprecision of the sentencing art and complexity of sentencing goals must allow for some degree of judicial discretion in deciding between different fines or terms of years, the degree of arbitrariness allowed a State is not so liberal where grave and irremedial punitive exactions are at stake, see *Skinner* v. *Oklahoma,* 316 U. S. 535 (1942), and none is graver or more irremediable than the sentence of death.

Moreover, the decision to impose the death penalty is more than a choice among divers instruments of correctional policy whose common, if individualized, objective is to treat the offender in a fitting fashion with a view to rehabilitation, incapacitation and deterrence. The decision to impose the death penalty withdraws a defendant from this ordinary sentencing regime, and subjects him to another, cf. *Specht* v. *Patterson, supra,* whose goals (assuming them to be rational at all) eschew rehabilitation, incapacitate beyond any arguable need for incapacitation, and focus exclusively on the limited deterrent concern of treating the defendant as an object, to be killed "pour decourager les autres." Concededly, the goals of sentencing are complex and in designing devices for achieving them the States must have some tolerance. But to concede the complexity of sentencing goals is no reason to sustain the Nebraska procedure which is not tied by reasonable standards to their fulfillment.[8] Inevitably under such a sentencing

[8] We need not take the stand in this case, of course, that the due process clause entirely forbids the exercise of discretion in sentenc-

regime, capital punishment in the few, arbitrarily selected cases where it is applied is both unjustifiable and lawless. The question of its constitutionality under the due process clause, we submit, is substantial.

III.

Imposition of the death penalty pursuant to section 28-401 inflicts loss of life without any compelling justification in violation of the due process clause of the Fourteenth Amendment.

Life is a fundamental right. Jefferson considered this proposition self-evident. "Life" heads his list of "inalienable" rights; it also heads the list of enumerated rights in the Fifth Amendment to the United States Constitution. Indeed, characterizing the right to life as "fundamental" verges on grotesque understatement. Existence is a prerequisite to the exercise of any rights.

When the state attempts to extinguish the right to exist it imposes a burden or a restriction on the exercise of that right. Again, conventional constitutional expression is woefully inadequate. If the greater ever included the lesser, exterminating life "restricts" its exercise.

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ing even in a capital case. Ways may be found to delimit and guide discretion and narrow its scope; and these may bring a grant of discretion within constitutionally tolerable limits. Whether the approach taken by a State such as Nevada, which makes certain reviewable findings of fact the indispensable condition of imposing capital punishment, see Nev. Rev. Stat. 200.360 (1963); or that of the Model Penal Code, which both establishes prerequisite findings and enumerates aggravating and mitigating circumstances, see American Law Institute, Model Penal Code, 210.6 (P. O. D. May 4, 1962) pp. 128-132, is not the question presented here.

When the state attempts to restrict a fundamental personal right it can do so only on the showing of a "compelling interest". *Sherbert* v. *Verner,* 374 U. S. 398, 406 (1963); *Bates* v. *Little Rock,* 361 U. S. 516, 524 (1950); *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 644 (1943); *Griswold* v. *Connecticut,* 381 U. S. 479, 497 (Goldberg, *J.,* concurring) (1965). In order to satisfy the requirement of "compelling interest" the state must demonstrate each of the following: (1) That the restriction imposed rationally relates to legitimate governmental objectives sought; (2) that the benefit to the public outweighs the impairment of the constitutional right and that (3) no alternative means less subversive of the constitutional right are available. See *Griswold* v. *Connecticut, supra,* at 497 (Goldberg, *J.,* concurring); *N. A. A. C. P.* v. *Alabama,* 377 U. S. 288, 307-08 (1964); *Sherbert* v. *Verner, supra* at 407; *Shelton* v. *Tucker,* 364 U. S. 479, 488 (1960); *Thomas* v. *Collins,* 323 U. S. 516, 530 (1945); *Schneider* v. *State,* 308 U. S. 147, 161 (1939).

The State's "interest" in the death penalty is the punishment of criminal offenders, under which four possible legislative ends are subsumed. They are: (1) vengeance; (2) rehabilitation; (3) incapacitation and (4) deterrence. Vengeance is not a legitimate legislative purpose. It is by nature irrational and if it were countenanced as an objective it would justify all cruel and unusual punishments, which are unconstitutional under the Eighth and Fourteenth Amendments. See Point IV, *infra.* The death penalty obviously has nothing to do with rehabilitation, except to render it impossible. Capital punishment does serve the goal of incapacitation, of course—and drastically. But this purpose can be served equally effectively by life imprison-

ment, which is obviously less subversive of the constitutional rights of defendants.[9]

This leaves deterrence as the remaining possible legitimating purpose of the extreme penalty. But statistical studies have established beyond question that capital punishment is not a more effective deterrent than life imprisonment. The most authoritative studies in the area have been done by Professor Thorsten Sellin. *Sellin, The Death Penalty* (Philadelphia, The American Law Institute, 1959). Comparing socially and economically similar States having capital punishment and lacking it, he found that their trends in homicide rates were indistinguishable. He made similar findings for periods before and after abolition in States which had abolished the death penalty. A special study of homicides of municipal policemen found no significant difference between abolitionist states and others. Accord: Graves, "The Deterrent Effect of Capital Punishment in California," in Bedau, *The Death Penalty in America,* 332 (1964). See the recent authoritative international studies: United Nations, Department of Economic and Social Affairs, Capital Punishment (ST/SOA/SD/9) (1962); United Nations, Department of Economic and Social Affairs, Capital Punishment—Developments 1961-1965 (ST/SOA/SD/10) (1967); President's Commission on Law

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[9] Life imprisonment is said by some to be less satisfactory than capital punishment because it is more expensive. This calculus is unproved and may be doubted in view of the legal expenses which normally accompany the imposition of the death penalty. See MacNamara, "Statement Against Capital Punishment," in Bedau, *The Death Penalty in America,* 182, 192-93 (1964). But even if the expense allegation is true it hardly represents a "compelling" state interest justifying the taking of human life. See *Sherbert* v. *Verner, supra,* at 406-07.

Enforcement and the Administration of Justice, Task Force Report: The Courts 27 (1967).[10]

If the death penalty has not been shown to deter in general, the deterrence claim is certainly no stronger in the State of Nebraska, where a total of four persons have been executed since 1930 out of the many convicted of crimes potentially carrying the death penalty. In Nebraska capital punishment serves no significant purpose at all; it is not an integral part of the law enforcement process; it is simply an irregular, aberrant and draconic hyper-penalty imposed once in ten years on some haphazardly chosen individual.

IV.

The sentence of death imposed on defendant pursuant to section 28-401 constitutes a cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

The phrase "cruel and unusual punishment" has never been free from ambiguity. It was initially intended to outlaw the gross tortures sometimes imposed in Stuart England. Gottlieb, "Testing the Death Penalty," 34 S. Cal. Law Rev. 268, 281 (1961). But this Court has made clear that the phrase is to be viewed in the light of "the

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[10] The Justice Department has taken the position that the death penalty fails to serve social interests better than other punishments. This position was stated by then Deputy Attorney General Ramsey Clark, in a letter to the Honorable John L. McMillen, Chairman, District of Columbia Committee, House of Representatives:

> "We favor the abolition of the death penalty. Modern penology with its correctional and rehabilitation skills affords greater protection to society than the death penalty which is inconsistent with its goals." *The New York Times*, July 24, 1965, at 1, col. 5.

evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles,* 356 U. S. 86, 101 (1958) (plurality opinion of Mr. Chief Justice Warren). As Mr. Justice McKenna stated for the Court in *Weems* v. *United States,* 217 U. S. 349, 373 (1910):

> "Time works changes, brings into existence new conditions and principles. Therefore, a principle to be vital, must be capable of wider application than the mischief which gave it birth. This is particularly true of constitutions. They are not ephermeral enactments, designed to meet passing occasions. They are to use the words of Chief Justice Marshall, 'Designed to approach immortality as nearly as human institutions can approach it.'"

The question of what punishments violate our "evolving standards of decency" is a difficult one, but some considerations are clearly relevant to the answer. First, cruelty in the constitutional sense is not limited to the infliction of physical pain. In *Trop* v. *Dulles, supra,* this Court held that loss of citizenship was a cruel and unusual punishment because, *inter alia,* "[i]t subjects the individual to a fate of ever increasing fear and distress." 356 U. S. at 102. Whether or not the execution would be carried out in a physically painful manner in this case, there is no doubt that condemned men and women suffer immense mental torture. See, e.g., Ranson, *I Want to Live* (1958). The average period between sentence and execution was 26.8 months in 1964. See Gottlieb, Capital Punishment: The Legal Challenge, ACLU Open Forum, 4-5 (Feb. 1966). This period cannot be described as other than one of "ever increasing fear and distress." 356 U. S. at 102. Ultimately, of course, deprivation of life is a penalty whose

cruelty uniquely cannot be measured solely in terms of the victim's sensations. Capital punishment is not only inherently brutal to its victims, but brutalizing to its inflictors.

Second, the discussion under Point III, *supra,* with respect to the need for capital punishment is critically relevant to deciding whether it is cruel and unusual. Lack of justification or necessity for the infliction of suffering is an integral part of the definition of cruelty.[11]

Perhaps the most important indication of its cruelty is the contemporary disuse of the death penalty in the United States.[12] Over the last four decades capital punishment has progressively ceased to become a regular part of the American system of criminal justice. Although a significant number of individuals are sentenced to death, the number of actual executions per year has declined dramatically from over one-hundred-and-fifty a year in the thirties to only one in 1966 and two in 1967:[13]

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[11] "Cruelty: 1. Quality or state of being cruel, disposition to inflict or enjoy unnecessary pain or suffering; inhumanity . . . . Webster, *New International Dictionary* 636 (unabr. 2d ed., 1954).

[12] In *Trop* v. *Dulles, supra,* the Court also looked to the practices of the other nations to help define cruelty. 356 U. S. at 102-03. In this case we note that the death penalty has been abolished in almost all of the countries of Western Europe, including Great Britain, Denmark, Finland, Italy, Monaco, Norway, Netherlands, Portugal, San Marino, Sweden, Switzerland, and West Germany. See United Nations Department of Economics and Social Affairs, Capital Punishment, Document ST/SDA/9. Monaco was added to the list in 1964. *New York Times,* June 20, 1964, at 2, col. 3.

[13] U. S. Department of Justice, *National Prisoner Statistics,* No. 39 "Executions 1930-1965" (1966); *Time,* July 7, 1967, at p. 47 (1966); New York Committee to Abolish Capital Punishment, Special News Report, Jan., 1964, at p. 2 (1967). Thirteen states have entirely or substantially eliminated the death penalty: Michi-

Year	*Amount*
1930-1934	776
1935-1939	890
1940-1944	645
1945-1949	639
1950-1954	413
1955	76
1956	65
1957	65
1958	49
1959	49
1960	56
1961	42
1962	47
1963	21
1964	15
1965	7
1966	1
1967	2

As noted above, in Nebraska itself, only four persons have been executed since 1930.

The long-standing disuse of the death penalty in Nebraska and its increasing disuse in the rest of the country raise sharply the relationship between the words "cruel" and "unusual." The phrase has sometimes been interpreted to mean either cruel or unusual. See *Weems* v. *United States*, 217 U. S. 349, 401 (White, *J.*, dissenting) (1910). By this

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gan, Rhode Island, Wisconsin, Maine, Minnesota, North Dakota, Alaska, Hawaii, Oregon, Iowa, West Virginia, Vermont, and New York, American Civil Liberties Union, Memorandum on Capital Punishment 2 (Feb. 1967). In several other states executions have been rare over the last thirty years, Bedau, *supra*, at 31.

standard, capital punishment is clearly an "unusual" punishment today in the United States. But even if the words are taken together, the unusualness of a punishment is surely important evidence of its cruelty, for cruelty inheres in a procedure in which a very few, fortuitously selected individuals are arbitrarily given different treatment than others in a similar position.

This consideration, in turn, suggests the intimate relation between the constitutional concept of cruel and unusual punishment and the vagaries inherent in the unsystematic and irregular procedure for choosing men to die, complained of in Point II, *supra*. Even assuming *arguendo* that the death penalty is not *per se* a cruel and unusual punishment, it is one as it is applied under Nebraska's procedure. A judgment of death under the Nebraska system of discretion by the trial and Supreme Courts is cruel and unusual because, imposed without standards, it is erratic, lacking a structured relationship to any alleged social purpose.

Any death inflicted in such an absence of standards is fundamentally and irremediably whimsical, however conscientious the efforts made to be fair; it is cruel and unusual not only because it is extreme, but also because it is wanton in its extremity.

CONCLUSION

For the reasons set forth above, certiorari should be granted.

Respectfully submitted,

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